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December 1, 2006

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: March 15, 2006

Case Number: TSO-0370

This decision concerns the eligibility of XXXXXXXXXXXX ("the Individual") for continued access authorization. This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the Individual's access authorization should be restored.

**I. APPLICABLE REGULATIONS**

The regulations governing the Individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." An individual is eligible for access authorization if such authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). "Any doubt as to an individual's access authorization eligibility shall be resolved in favor of the national security." *Id.* See generally *Dep't of the Navy v. Egan*, 484 U.S. 518, 531 (1988) (the "clearly consistent with the interests of national security" test indicates that "security-clearance determinations should err, if they must, on the side of denials").

If a question concerning an individual's eligibility for a clearance cannot be resolved, the matter is referred to administrative review. 10 C.F.R. § 710.9. The individual has the option of obtaining a decision by the manager at the site based on the existing information or appearing before a hearing officer. *Id.* § 710.21(3). If the Individual opts for a hearing, the individual must present testimony or evidence to show that he is eligible for access authorization, i.e., that access authorization will not endanger the common defense and security and will be clearly consistent with the national interest." *Id.* § 710.27(a).

## II. BACKGROUND

The Individual has been employed at a DOE facility in a position that requires her to hold an access authorization. In December 2000, the Individual was arrested and charged with Possession of Marijuana. In a Statement of Probable Cause (“the arrest report”), the arresting officer described the events leading to the arrest. DOE Exhibit (“Ex.”) 12. The officer stated that he stopped the Individual because she appeared to be speeding. *Id.* He stated that when he approached the Individual’s vehicle,

[The Individual] opened the door, and when she did so [he] smelled a strong odor of marijuana coming from the vehicle and [the Individual] appeared very nervous. [He] asked her how much marijuana she smoked and she said none, [he] asked her again how much she smoked. It was then she told [him] she had taken a puff a few minutes ago. She told [him] that she was on her way to court and was nervous about it that’s why she was smoking. [He] asked if there was any in the car and she handed [him] a green, white, and red cylinder containing a marijuana cigarette. At that time [he] placed her under arrest for Possession of Marijuana.

*Id.* The Individual was charged with a speeding violation and possession of marijuana. DOE Ex. 11. The final order on the criminal complaint indicates that in January 2001 the Individual paid a fine of \$109.00 and both charges were “deferred/dismissed.” *Id.*

In July 2004, the Individual completed a Questionnaire for National Security Positions (QNSP). The Individual did not disclose her arrest or the resulting criminal charges on the form. DOE Ex. 13. The Individual answered “no” to question 23(d), “Have you ever been charged with or convicted of any offenses related to alcohol or drugs?” The Individual also answered “no” to question 23(f), “In the last 7 years, have you been arrested for, charged with or convicted of any offense(s) not listed in response to a, b, c, d, or e above? (Leave out traffic fines of less than \$150 unless the violation was alcohol or drug related.)” *Id.*

In October 2005, the Individual was the subject of a personnel security interview (PSI). DOE Ex. 16. During the PSI, the Individual stated that she never used illegal drugs. *Id.* The Individual also disputed portions of the arrest report. She denied that she told the officer that she smoked marijuana prior to being pulled over for speeding. She also denied that she handed the officer a cylinder containing a marijuana cigarette. *Id.* The Individual was asked during the PSI about her failure to disclose her arrest and the resulting charges on the July 2004 QNSP. The Individual acknowledged that she was taken to the police station following the incident, but that she did not believe she had to disclose it to DOE because the case was dismissed. *Id.* The Individual stated that she did not intentionally falsify her responses on the QNSP. *Id.*

In February 2006, the DOE notified the Individual that her December 2000 arrest, her responses on the July 2004 QNSP, and her responses to the questions about her arrest during the October 2005 PSI constituted derogatory information that created a substantial doubt as to the Individual’s continued eligibility for an access authorization under 10 C.F.R. § 710.8(f), (k), and (l). (Criteria F, K, and L). Notification Letter, February 8, 2006. Upon receipt of the Notification Letter, the Individual requested a hearing in this matter. *See* Individual’s Letter,

February 27, 2006. The DOE forwarded the request to the Office of Hearings and Appeals (OHA). The OHA Director appointed me to serve as the hearing officer.

In her response to the Notification Letter, the Individual disputed the allegations contained in the arrest report regarding her arrest. *Id.* She also maintained that she did not intentionally falsify or withhold information from the DOE security office. *Id.*

A hearing was held in this matter. Both the Individual and the DOE counsel submitted documents. At the hearing, the Individual, represented by counsel, presented her own testimony as well as the testimony of several witnesses to corroborate her position that she did not use marijuana and that she is honest, reliable, and trustworthy. The DOE counsel also questioned those witnesses, eliciting testimony intended to emphasize the serious nature of the security concerns at issue, as well as testimony relevant to the Individual's mitigation arguments. The DOE counsel did not present any witnesses.

### **III. THE HEARING**

In addition to the Individual, five witnesses testified at the hearing. They were: the Individual's daughter, two friends of the Individual, the Individual's supervisor, and a clinical psychologist.

#### **A. The Individual**

The Individual testified about the events surrounding her arrest. She testified that she had not smoked marijuana and did not know why it was in her car.

The Individual stated that she was on her way to court to attend a hearing involving her daughter and she was pulled over for speeding. Transcript ("Tr.") at 13. According to the Individual, the officer informed her that her car smelled like marijuana and he told her to step out of the car. *Id.* The officer searched the Individual's car and found half of a marijuana cigarette in the ashtray in the center console. *Id.* The Individual stated, "[the officer] said, 'You've been smoking,' and I said 'No,' and he handcuffed me, and he pretty much pushed me into his car and kept me there maybe for 15, 20 minutes [while he searched the rest of the car]." Tr. at 14.

The Individual testified that, contrary to the arrest report, she had not smoked marijuana. She stated that she did not know why the arrest report states that she told the officer she had smoked it because she was nervous about going to court. Tr. at 15. The Individual stated that she remembered telling the officer that she was on her way to court. "I don't remember telling him the nervous part, but I did say that I was rushing, because I was speeding, that I was rushing to [ ] a court hearing for my daughter, but I don't recall saying the nervous, but – and I don't – I didn't give him [a] cylinder or whatever he had charged me with." *Id.*

The Individual stated that she was not aware that there was marijuana in her car. Tr. at 16. She stated that she did not notice an unusual or odd smell in her car prior to her arrest. Tr. at 44. She added, however, that she did not know what the substance smelled like. *Id.* The Individual stated that she loaned her car to her daughter the night before her arrest and that her daughter used the car to go out with several friends. Tr. at 15. The Individual stated that after the

incident, her daughter apologized to her and told her that her friends had smoked marijuana in the car the night before the arrest. Tr. at 33.

The Individual stated that she went to court to respond to the charges arising from her arrest. Tr. at 17. According to the Individual, she pled no contest to the charges because, although the marijuana was not hers, it was found in her car. She stated that she explained to the judge what happened and that he dismissed the charges. Tr. at 18.

The Individual stated that she was aware that there were rules and regulations she had to follow with respect to maintaining her clearance. Tr. at 11. She stated that her understanding regarding reporting requirements for “things like the court situation and the police situation” was that she had to report it if the fine was over a certain amount “and I was just so embarrassed and humiliated that I just didn’t want anybody to know about this.” Tr. at 19. She added that she understood why her failure to report was of concern to the DOE. *Id.*

The Individual testified regarding her responses on the July 2004 QNSP. When asked to about her negative response to question 23(d), the Individual stated that she answered, “no,” because she felt “that it didn’t apply” because the case was dismissed. Tr. at 50. She stated that she believed the question was asking whether she had been convicted of any charges. *Id.* Regarding her response to question 23(f), the Individual stated,

I still believed then, when I signed this, that because it was dismissed and because what they charged me with was the traffic violation, that was the money that I paid, and it wasn’t \$150, and that’s the reason I answered what I answered.

Tr. at 51. The Individual stated that had the charges been pending at the time she completed the July 2004 QNSP, rather than dismissed, she would have reported them. Tr. at 48.

The Individual stated that at the time of the incident she believed she was under arrest. Tr. at 34. However, she indicated that at the time of the PSI she was confused because although she had been taken to the jail, she was only there for a short time and the case was dismissed. Tr. at 34, 47. The Individual added that she answered the questions during the PSI honestly and that she stated during the PSI that she did not report the offense because the fine was under \$150. Tr. at 54. The Individual stated that, knowing what she now knows, she would report the incident to security immediately were it to happen today. Tr. at 126. She also stated that she will report the incident in any future reinvestigations of her security clearance. Tr. at 127.

## **B. The Individual’s Daughter**

The Individual’s daughter testified that she borrowed the Individual’s car the night before the Individual’s arrest. Tr. at 63. She stated that her friends smoked marijuana in the Individual’s car that night. *Id.* When asked whether she believed the Individual lied or fabricated stories, the Individual’s daughter replied, “She’s never lied to me. She’s always been straightforward.” Tr. at 64. She added, “I have my priorities in life because of [the Individual]...She doesn’t let [anything] slide...” Tr. at 65. The Individual’s daughter stated that the Individual was “totally

devoted and dedicated to [her] family” in her free time. Tr. at 70. When asked about the Individual’s hobbies or other interests, the Individual’s daughter stated,

Family. Primarily family. Honest, my mom has never – she’s not that type to even go to casinos or bars or clubs, and if she does, well, then, you know, she deserves a night out, but that’s once in a while that I can remember[.]

*Id.* The Individual’s daughter stated that she has never known the Individual to use illegal drugs. Tr. at 64.

### **C. The Individual’s Friends**

Friend No. 1 testified that she has known the Individual for approximately 30 years. Tr. at 72. She stated that she has never known the Individual to use any illegal drugs. Tr. at 78. When asked about how the Individual spends her free time, Friend No. 1 stated,

[The Individual is] family oriented. She spends a lot of time with her children, her grandchildren. She’s always trying to help her daughter through college, taking care of the kids, you know, the times I’ve talked to her anyway.

Tr. at 78. Friend No. 1 stated that she believed the Individual to be reliable and trustworthy. Tr. at 79. She stated that in the time she has known the Individual, she has never had any concerns regarding the Individual’s honesty. Tr. at 73. She added that she believed the Individual was honest even against her own interest. Tr. at 80.

Friend No. 2 stated that she was a former co-worker of the Individual and that they used to socialize together “after work, sometimes, on weekends, [over] lunch with the kids.” Tr. at 83. Friend No. 2 stated that during the time she and the Individual worked together, the Individual’s reputation among her co-workers and supervisors was as a “pleasant, hard working, dependable...[and] knowledgeable” person. Tr. at 79-80. She stated that she had never known the Individual to use any illegal drugs. Tr. at 85. Friend No. 2 also stated that she had no concerns regarding the Individual’s honesty and was unaware of anyone ever raising concerns about the Individual’s honesty. Tr. at 84. She stated that she learned of the Individual’s arrest from the Individual herself. According to Friend No. 2, the Individual told her that the marijuana found in her car did not belong to her. “She said that her daughter – teenage daughter had the car the night before, and [the Individual] was being accused for something that didn’t belong to her[.]” Tr. at 86.

### **D. The Individual’s Supervisor**

The Individual’s supervisor testified that he had a very high opinion of the Individual. The Individual’s supervisor stated that he never had any problems with the Individual. Tr. at 93. He added, “She’s absolutely the top [employee in her position] that I’ve ever had in any of the jobs that I’ve had previously up to this point.” *Id.* He stated that he had no reservations about promoting the Individual. Tr. at 94. He added, “I could see absolutely no problems about her reliability, accuracy, discretion. There just weren’t any problems.” Tr. at 95. He also stated

that the Individual had handled classified material and that he had no reservations about her doing so. *Id.*

The Individual's supervisor stated that the Individual informed him of her arrest when her clearance was suspended. Tr. at 96. He stated that the Individual told him that the marijuana was not hers and that she believed it could have belonged to her daughter. Tr. at 97. When asked about his reaction to the arrest and the Individual's failure to disclose it, the Individual's supervisor stated,

This was a lapse in judgment. I mean, this is a pretty serious matter...[O]n the basis of the absolute reliability and steadiness that she's shown to me up to this time, I was surprised that this happened. She explained to me her emotions about why she had done this, and so I – I think I understand why she had done this, and so I – I think I understand why she did it, but I think that it was a mistake.

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She told me she was extremely embarrassed, because I think that everyone – everyone who I know who knows [the Individual] thinks of her as being absolutely straight arrow, steady, consistent, reliable, and that something like this sort of happens is just totally out of character.

Tr. at 98. The Individual's supervisor stated that he has never known the Individual to lie or shade the truth. Tr. at 99. He added that, if the Individual's security clearance were restored, he would have no concerns about having her back to work for him and added that he believed that what the Individual was going through regarding her clearance would be "a learning experience" for her. *Id.*

The Individual's supervisor stated that he believed that with the exception of not disclosing her arrest, the Individual has always shown "good judgment and good discretion." Tr. at 100. He stated that he has never seen any evidence that the Individual was a user of illegal drugs. Tr. at 102. The Individual's supervisor stated that he believed the Individual to be honest, reliable and trustworthy. Tr. at 102. He stated that his opinion remained unchanged despite the Individual's failure to disclose her arrest:

As soon as it cropped up, you know, we went aside immediately and we discussed it right away, and she didn't have any reservations about telling me anything about it...I've seen no evidence that...there is some underlying thread of dishonesty concerning this that's running through here.

Tr. at 105. He concluded that he was confident that the Individual was "not going to do this again." *Id.*

### **E. The Clinical Psychologist**

The clinical psychologist stated that he performed an evaluation of the Individual at her request. Tr. at 110. Regarding the results of the evaluation, the psychologist concluded that,

[T]here were no signs...of major thought, mood, or perceptual disorder. In other words, there were no signs whatsoever of the types of psychological or mental difficulties that are often involved in these types of cases...there was nothing about her testing which suggested that this was an individual who would be inclined to be dishonest or untrustworthy.

Tr. at 113-114. He stated, “this is basically an intelligent, capable, hard-working and honest individual.” Tr. at 114. The psychologist stated that he believed the Individual’s failure to disclose her arrest was “a lapse in judgment and not characteristic of her.” Tr. at 115. When asked why he believed the Individual did not report the arrest, the psychologist stated that he believed the Individual’s lack of experience with a situation such as she faced – being handcuffed, arrested, and taken to a police station – combined with the fact that the case was ultimately dismissed and the Individual’s “embarrassment and humiliation” over the incident led her to answer the QNSP the way she did. Tr. at 116. He stated, “I’m sure it was a terrible experience, and, again, because of the way that it came out, from her point of view, she was not being dishonest in handling things the way that she did[.]” Tr. at 117. The psychologist added that he had no doubt that the Individual has learned from this difficult experience. Tr. at 118.

## **IV. STANDARD OF REVIEW**

Under Part 710, the DOE may suspend an individual’s access authorization where “information is received that raises a question concerning an individual’s continued access authorization eligibility.” 10 C.F.R. § 710.10(a). After such derogatory information has been received and a question concerning an individual’s eligibility to hold an access authorization has been raised, the individual must prove that “the grant or restoration of access authorization to the Individual would not endanger the common defense and security and would be clearly consistent with the national interest.” 10 C.F.R. § 710.27(a).

Derogatory information includes, but is not limited to, the information specified in the regulations. 10 C.F.R. § 710.8. In considering derogatory information, the DOE considers various factors including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. *Id.* § 710.7(c). The ultimate decision concerning eligibility is a comprehensive, common sense judgment based on a consideration of all relevant information, favorable and unfavorable. *Id.* § 710.7(a).

## V. ANALYSIS

### A. The Security Concerns

It is beyond dispute that use of illegal drugs raises security concerns. *See* 10 C.F.R. Part 710, App. B; 66 Fed. Reg. 47069 (“Adjudicative Guidelines Approved by the President in Accordance with the Provisions of Executive Order 12968”) (“Drug abuse or dependency may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.”); *Personnel Security Hearing, Case No. VSO-0113*, 25 DOE ¶ 85,512 (1995) (“The drug user puts his own judgment above the requirements of the laws, by picking and choosing which laws he will obey or not obey. It is further the concern of the DOE that the drug abuser might pick and choose which DOE security regulations he will obey or not obey with respect to protection of classified information.”).

In addition, the DOE security program is based on trust, and when a security clearance holder breaches that trust, it is difficult to determine to what extent that individual can be trusted again in the future. *See, e.g., Personnel Security Hearing, Case No. VSO-0013*, 25 DOE ¶ 82,752 at 85,515 (1995); *Personnel Security Hearing, Case No. VSO-0281*, 27 DOE ¶ 82,821 at 85,915 (1999), *aff’d*, 27 DOE ¶ 83,030 (2000). Furthermore, both drug use and providing false information to DOE call into question the user’s judgment and reliability. *See, e.g., Personnel Security Hearing, Case No. VSO-0023*, 25 DOE ¶ 82,761 (1995) (stating that “any drug usage while the individual possesses a [security] clearance and is aware of the DOE’s policy of absolute abstention demonstrates poor judgment.”); *see also Personnel Security Hearing, Case No. VSO-0054*, 25 DOE ¶ 82,783 (1995) (stating that failure to report arrests to DOE creates serious doubts about an individual’s honesty and trustworthiness).

Given the Individual’s failure to disclose her arrest on her 2004 QNSP and the discrepancies between the Individual’s account of the events surrounding her arrest and the arrest report, I find that the local security office had valid grounds for invoking Criteria F, K, and L. Thus the only issue remaining is whether these security concerns have been resolved.

### B. Mitigating Factors

I find that the Individual has adequately mitigated the Criterion K concern – that she smoked marijuana. I believe the Individual’s testimony that she never smoked marijuana and never told the police officer who arrested her that she had smoked the substance. The Individual’s account of the incident leading to her arrest was identical both during the PSI and at the hearing. Moreover, the Individual’s version of events is consistent with the fact that she was not charged with smoking marijuana or driving under the influence of marijuana. The Individual also brought forth at the hearing the testimony of two friends who have known her for several years, her daughter, and her supervisor to corroborate her assertion that she was not a user of illegal drugs. I believe each of the witnesses testified honestly and candidly.

The Criteria F and L concerns – regarding whether the Individual falsified and withheld information and whether she is honest, reliable, and trustworthy – are more difficult to mitigate. Criteria F and L concerns involve the future honesty and candor of an individual. In order to



adequately mitigate these concerns, an individual has the difficult burden of convincing the hearing officer that he can be trusted to be honest and forthright with DOE in the future.

As an initial matter, I was concerned with the Individual's explanation that at least part of the reason she did not disclose her arrest or the resulting charges was that she was embarrassed about the situation. As mentioned above, the DOE security program is based on trust. The DOE relies on its clearance-holders to report unfavorable information regardless of whether they are embarrassed by it or unsure of the consequences. When an individual fails to report unfavorable information, it leads the DOE to question whether that individual can be trusted to report any such information in the future. However, based on the testimony of the Individual and her witnesses, I am convinced that the Individual understands the necessity of reporting unfavorable information to the DOE and the severity of the consequences for failing to do so. She testified that if an incident such an incident arose in the future she would report it immediately and I believed her.

Turning to the Individual's responses on her 2004 QNSP, it is undisputed that the Individual did not disclose her arrest on the form. This was a serious error. Now, the Individual maintains that at the time she completed the form she did not believe she was required to do so because the charges were ultimately dismissed and she believed the matter was resolved. I believe that the Individual was unsure whether to report the arrest to DOE and that the decision of whether or not to do so was a close call in her mind. Obviously, her decision not to report the arrest was incorrect and demonstrates a lapse in judgment.

I believe, however, that the ultimate disposition of the charges was the determining factor in her decision. The Individual demonstrated apparent confusion during the PSI and the hearing regarding the effect of the dismissal of the charges on the entire matter. The Individual stated that had the charges been pending at the time she completed the QNSP, she would have reported them and the arrest, but that because they had been dismissed she did not believe she had to report them. Based on the Individual's testimony during the PSI and at the hearing, she appears to also have been confused about the nature of the questions on the QNSP and she believed at the time that she answered them honestly.

Based on the evidence in the record, and my impression of the Individual's character, truthfulness, and reliability, this lapse in judgment was an isolated incident. The DOE has known about the Individual's incorrect answers on the July 2004 QNSP for well over a year. DOE Ex. 4. Nothing in the record indicates that the Individual has withheld other information before or since her arrest or that there have been other concerns regarding her honesty. Furthermore, the Individual's arrest occurred nearly six years ago and she has not been involved in any other similar incidents. Finally, the Individual stated that she would report the arrest on any future QNSP and that if a similar situation occurred in the future she would report it immediately and I believed her testimony.

The Individual's witnesses all stated that the Individual was very honest, reliable and trustworthy. Although I found the testimony of the Individual's friends and daughter regarding the Individual's honesty helpful, I was most persuaded by the testimony of the Individual's supervisor and the psychologist. The supervisor stated that he knew the Individual to be honest,

reliable, and trustworthy and that he had no reservations about having the Individual work for him, despite her lapse in judgment in failing to report her arrest. He added that he was not aware of any other concerns or incidents regarding the Individual's honesty. He was convinced that the Individual's failure to report the arrest was an aberration of her character and that she had learned from the experience. This is consistent with the results of the tests administered to the Individual by the clinical psychologist. Based on those tests, the clinical psychologist determined that the Individual was not someone inherently dishonest or untrustworthy. Rather, he believed that the Individual's lack of experience in dealing with police or criminal matters and her confusion over the effect of the dismissal of the charges led to her failure to report her arrest. The clinical psychologist's belief is consistent with my impression of the Individual. I agree with both the Individual's supervisor and the psychologist when they describe the Individual's failure to disclose her arrest as being a lapse of otherwise good judgment and out of character.

Based on the testimony at the hearing and the other evidence presented in this case, I believe that the Individual has successfully mitigated the security concerns raised by the derogatory information cited in the Notification Letter.

## **VI. CONCLUSION**

Upon consideration of the record in this case, I find that there was evidence that raised a doubt regarding the Individual's eligibility for a security clearance. I also find that there is sufficient evidence in the record to fully resolve that doubt. Therefore, I conclude that restoring the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, I conclude that the Individual's access authorization should be restored.

Diane DeMoura  
Hearing Officer  
Office of Hearings and Appeals

Date: December 1, 2006